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No. 88-1111

In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD WILKINS AND RICO INDUSTRIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' employer was deprived of money or property within the meaning of the mail fraud statute, 18 U.S.C. 1341, as the result of a commercial kickback scheme.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Carpenter v. *United States*, No. 86-422 (Nov. 16, 1987)	3, 4, 5
McNally v. *United States*, No. 86-234 (June 24, 1987)	3, 4, 5, 6, 7
United States v. *Asher*, 854 F.2d 1483 (3d Cir. 1988), cert. denied, No. 88-532 (Jan. 17, 1989)	5
United States v. *Fagan*, 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988)	5, 6
United States v. *Holzer*, 840 F.2d 1343 (7th Cir. 1988)	6, 7
United States v. *Ochs*, 842 F.2d 515 (1st Cir. 1988)	6, 7
United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), cert. denied, No. 87-1946 (Oct. 3, 1988)	5
United States v. *Piccolo*, 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988)	5
United States v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987)	5, 6
United States v. *Shelton*, 848 F.2d 1485 (10th Cir. 1988)	7

Statutes:

18 U.S.C. 1341	2
18 U.S.C. 3651	2

Miscellaneous:

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988)	7
134 Cong. Rec. S17,375 (daily ed. Nov. 10, 1988)	7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 854 F.2d 710.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1988. A petition for rehearing was denied on October 11, 1988. On December 6, 1988, Justice White extended the time for filing a petition for a writ of certiorari to December 27, 1988, and the petition was filed on December 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted on seven counts of mail fraud, in violation of 18 U.S.C. 1341, and acquitted on one count of mail fraud. Petitioner Wilkins was sentenced to concurrent terms of five years' imprisonment on each count, all but six months of which was suspended in favor of probation. Wilkins was also fined $1,000 on each count, ordered to perform 384 hours of unpaid community service, and ordered to make restitution of $519,838. Petitioner Rico Industries, Inc., was ordered to pay the restitution jointly with Wilkins.[1]

Petitioner Richard Wilkins was the district manager of the Corpus Christi division of the Lone Star Gas Company, a public utility providing natural gas to customers in Oklahoma and Texas. In 1980 Wilkins negotiated a contract under which Lone Star purchased 20 billion cubic feet of natural gas from the Coronado Transmission Company. On its face, the contract appeared to be competitive and favorable to Lone Star. In a side agreement, however, Coronado's president, Louis A. Fritz, agreed to pay Wilkins kickbacks of 25 percent of the net revenues Coronado received from its sales of natural gas to Lone Star. The kickbacks were concealed through a system of intercorporate transfers that resulted in funds being conveyed

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[1] While affirming the convictions, the court of appeals concluded that a defendant may not be ordered to pay prejudgment interest on a restitution order under 18 U.S.C. 3651. The court therefore reversed the district court's order to that extent. As a result, Wilkins will be required to pay $368,400 in restitution. The court of appeals also concluded that Rico Industries could not be ordered to make restitution under Section 3651 because it had not been placed on probation. The court therefore also reversed that part of the district court's order. Pet. App. 4a, 9a-10a.

from Coronado and two other companies controlled by Fritz to petitioner Rico Industries, Inc., a company set up and controlled by Wilkins. Pet. App. 2a-3a.

The court of appeals affirmed the convictions. Pet. App. 1a-10a. It found that the evidence established that petitioners' kickback scheme deprived Lone Star of property within the meaning of *McNally* v. *United States,* No. 86-234 (June 24, 1987), even though the cost of the kickbacks was passed on to Lone Star's customers and Lone Star obtained the maximum profit it could receive under the governing regulatory regime. The court observed that "[a]lthough a lower purchase price would not directly create greater profits because [Lone Star's] profit from the conduct of its business was set by law, Lone Star could have sold the gas to its customers at a lower rate and still maintained its maximum profit margin." Pet. App. 7a. The court pointed out that "[s]uch a lower selling price translates directly into economic benefits to Lone Star; a lower price increases Lone Star's good will, can increase user consumption, and most importantly, confirms Lone Star's fulfillment of its duty as a public utility—to provide quality service at the lowest possible price." *Id.* at 7a-8a. The court accordingly concluded that "[t]he fact that Wilkins' kickback was passed directly to customers does not negate the impact his fraud caused Lone Star" since "[d]irect monetary loss is not required by the mail fraud statute." *Id.* at 8a, citing *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987).

ARGUMENT

1. Petitioners' contention (Pet. 9-10) that the decision of the court of appeals is inconsistent with this Court's decisions in *McNally* v. *United States,* No. 86-234 (June 24, 1987), and *Carpenter* v. *United States,* No. 86-422

(Nov. 16, 1987), is plainly without merit. *McNally* involved a scheme under which the defendants, who controlled the selection of Kentucky's workers' compensation insurer, selected an agency that agreed to pay the defendants a portion of the commissions it received from underwriting the policy. The defendants were charged with and convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights" (slip op. 10), this Court reversed. The Court explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property" (*ibid.*). In fact, noting that "the Government now relies in part on the assertion that the petitioners obtained property by means of false representations," the Court concluded that the convictions could not be upheld on that basis because "there was nothing in the jury charge that required such a finding." *Id.* at 10-11. All that the jury in *McNally* had to find to convict, as the Court subsequently noted in *Carpenter* v. *United States* (*id.* at 6), was that Kentucky had been deprived of the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute."

In *Carpenter,* the Court made clear that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." Slip op. 6. The Court concluded that the mail fraud statute "reach[es] any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises" (*id.* at 7), and held that a conspiracy to trade on an employer's confidential business information is within the reach of the statute. Thus, where the jury instructions require a finding that an employer was deprived of a prop-

erty interest, whether tangible or intangible, a mail fraud conviction is not invalid.

The decision of the court of appeals in this case is fully consistent with *McNally* and *Carpenter*. This case involved a straightforward kickback scheme through which petitioners received unearned commissions from Lone Star's supplier. The other courts of appeals that have addressed the issue since this Court's decision in *McNally* have overwhelmingly agreed that normal kickback schemes involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Asher*, 854 F.2d 1483 (3d Cir. 1988), cert. denied, No. 88-532 (Jan. 17, 1989); *United States* v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), cert. denied, No. 87-1946 (Oct. 3, 1988); *United States* v. *Piccolo*, 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988); *United States* v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987); *United States* v. *Fagan*, 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988).

Lone Star paid too much for the gas it purchased from Coronado since, as the court of appeals explained, "[i]f Lone Star had known of the kickback, it could have negotiated with Coronado for itself and its customers to receive the sums Wilkins was secreting for himself." Pet. App. 8a. While Lone Star would not have directly profited from lowering Coronado's sales price, it would have been able to pass the savings along to its customers. As the court of appeals recognized (*id.* at 8a), Lone Star would have benefited from the good will that such a price reduction would create. The court of appeals correctly concluded that good will, while intangible, is a property interest within the meaning of the mail fraud statute as construed in *McNally* and *Carpenter*.

2. Nor is there merit to petitioners' contention (Pet. 10-12) that review is warranted because the Fifth Circuit's

decision here conflicts with the First Circuit's decision in *United States* v. *Ochs,* 842 F.2d 515 (1988). *Ochs* is distinguishable from this case because the jury in that case might have convicted the defendant of mail fraud without finding that the City of Boston, the alleged victim of the scheme, lost money or property as a result of the defendant's activities. The court of appeals in that case found that the jury might have convicted the defendant only because the City was deprived of the defendant's honest and faithful services. Indeed, the jury instructions that the government submitted in that case (which were delivered "virtually verbatim") stated that "it is irrelevant whether the City lost any money as a result of the scheme." *Id.* at 524-525 (emphasis omitted). Moreover, the government disagreed with the defendant's contention that the intangible rights theory in that case could not be separated from the kickback theory, and it vigorously (and successfully) opposed the defendants' proposal to delete the language relating to the intangible right to honest and faithful government service from the jury instructions. *Ibid.*

To be sure, the First Circuit also noted in dictum its disagreement with the Fifth Circuit's earlier decisions in *Richerson* and *Fagan,* and suggested that it did not think that, under *McNally,* mail fraud convictions were permissible in kickback cases. 842 F.2d at 525-527.[2] That disagreement is not of sufficient continuing importance to warrant this Court's review, however.[3] Congress recently

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[2] While questioning the Fifth Circuit's reasoning in its kickback cases, the First Circuit noted that adoption of the Fifth Circuit's theory "would not warrant a different result here, because that was not the theory of criminal liability put to the jury." 842 F.2d at 527 n.11.

[3] In addition to *Ochs,* petitioner suggests (Pet. 11) that the Seventh Circuit in *United States* v. *Holzer,* 840 F.2d. 1343 (1988), and the

amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988). The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,375 (daily ed. Nov. 10, 1988). As petitioners appear to recognize (Pet. 9 n.4), an employee's participation in a kickback scheme like the one in this case would clearly fall within the scope of that new provision. Accordingly, petitioners' contention that their convictions in this case are inconsistent with *McNally* is not a claim that has any prospective importance.

Tenth Circuit in *United States* v. *Shelton*, 848 F.2d 1485 (1988), have disagreed with the Fifth Circuit's approach in kickback cases. However, the Seventh Circuit distinguished the judicial bribery at issue in *Holzer* from the commercial kickback scheme involved in *Richerson* by concluding that an employer is "hurt in its pocketbook" by a commercial kickback scheme, whereas the government does not lose money when a judge takes a bribe. 840 F.2d at 1348. The Tenth Circuit, while "agree[ing] with the discussions in *Ochs* and *Holzer*" (848 F.2d at 1492), based its reversal of the convictions in *Shelton* on the language of the indictment and the jury instructions in that case (*id.* at 1492-1497), and did not discuss the Fifth Circuit's decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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